Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1784

DR. H. D. HARDWICK, President, DR. JAMES CLIFFORD, Vice President, DR. W. R. GILBERT, DR. WALTER R. WILSON, JR., and DR. ALLAN WASSERMAN, Individually, and as Members of the Georgia State Board of Examiners in Optometry and THE STATE BOARD OF EXAMINERS IN OPTOMETRY,
Petitioners,

vs.

DR. DAVID JACOBS,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT FOR CERTIORARI

To the United States Court of Appeals for the Fifth Circuit

HUGH W. GIBERT
HAAS, HOLLAND, LEVISON & GIBERT
2700 First National Bank Tower
Atlanta, Georgia 30303
Attorneys for Respondent

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

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REASONS FOR DENYING THE WRIT

I. There Are Neither Special Nor Important Reasons in the Case at Bar Which Require This Court to Exercise Its Discretion and Grant Review on Certiorari.

Rule 19 of this Court provides that review on writ of certiorari is not a matter of right, but of sound judicial discre-

tion, and will be granted only where there are special and important reasons therefor. Listed in Rule 19 are several "indicators" of the character of reasons which will be considered. Among these are those situations where a court of appeals has decided an important question of federal law which *has not been*, but should be settled by this court, or has decided a federal question in a way in *conflict* with applicable decisions of this Court.

The case at bar lies far beyond the range of cases which Rule 19 seems to contemplate reaching. In fact, this Court has already spoken on the precise issue raised by Petitioners on this appeal. *See*: *Gibson v. Berryhill*, 411 U.S. 564 (1973). The decision of the United States Court of Appeals for the Fifth Circuit in the case at bar did not conflict with applicable relevant decisions of this Court. Indeed, it was entirely consistent with this Court's affirmance of the decision of the three-judge District Court for the Northern District of Georgia on the same issue in *Wall v. Hardwick*, 419 U.S. 888 (1974).

II. The Decision in the Wall Case Is Directly on Point With the Case at Bar.

The three-judge District Court for the Northern District of Georgia considered the evidence in the cases of *Wall v. The American Optometric Association, Inc.* and *Justice v. Georgia State Board of Examiners in Optometry*, 379 F. Supp. 175 (N.D. Ga., 1974) (hereinafter referred to collectively as "Wall"), and rendered a comprehensive opinion on the matters presented therein. The *Wall* case is identical to the case at bar in all major respects inasmuch as:

1. The exact same parties are involved, Respondent David Jacobs and the Petitioner Board and its members;

2. substantially the same evidence as to the Board's bias was presented;

3. the same legal issues as regards the Board's bias were argued and decided.[1]

The *Wall* court found the same Board which is involved in the case at bar to be biased. This bias resulted from the fact that each member of the Board, themselves all members of the Georgia Optometric Association (hereinafter G.O.A.), would have a personal economic interest in the reduction of the number of optometrists practicing in Georgia.

Petitioners advanced essentially the same arguments in *Wall* that they now seek to assert here; namely, that there is no reasonable possibility of any bias based on personal pecuniary interest, and if there were the potential for such bias, the appointment of an allegedly independent hearing examiner cured it; that membership in the G.O.A. did not disqualify them from judging a non-member; and that the case of *Gibson v. Berryhill*, 411 U.S. 564 (1973), is not controlling authority for the purpose of this case.

The District Court rejected each of these contentions. This Court affirmed the decision of the District Court in *Wall v. Hardwick*, 419 U.S. 888 (1974). Therefore, Respondent submits that the *Wall* case, which considered the same evidence and the same legal issues, is directly on point in this case.

Petitioners seek to avoid the direct impact of *Wall* on this case by the use of edited quotations from the case of *Withrow v. Larkin*, 421 U.S. 35. Petitioners would interpret *Withrow* as establishing a presumption of integrity and honesty in all administrative adjudications; however, a complete reading reveals that the

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[1] The *Wall* case involved a different set of regulations; however, the Board's authority to enforce these regulations and its bias in so doing were at issue in *Wall* and the case at bar.

court limits such a presumption to the administrative proceeding which involves the mere combination of investigative and adjudicative functions, *with nothing more*. The evidence in the case at bar clearly removes it from the limited factual situation of *Withrow*. Indeed, the *Withrow* opinion cites and adopts the pecuniary interest bias doctrine of *Gibson v. Berryhill*, upon which the *Wall* case is based:

> . . . various situations have been identified in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable. Among these cases are those in which the adjudicator has a pecuniary interest in the outcome and in which he has been the target of personal abuse or criticism from the party before him. 421 U.S. 47.

Respondent submits that *Withrow v. Larkin* not only does not "discredit", but is entirely consistent with the holding in *Wall*. It is clear from a complete reading of *Withrow* that it does establish a presumption of integrity and honesty in a case which involves a mere combination of investigative and adjudicative functions, *with nothing more*. It is just as clear that when something more is present, such as the economic interest and personal bias of the Board in the case at bar, no such presumption arises.

III. The Holding in Gibson v. Berryhill Should Be Controlling in the Case at Bar.

In *Gibson v. Berryhill*, 411 U.S. 564 (1973), this Court considered a situation identical to the one at hand. The Alabama Board of Optometry was attempting to revoke licenses of certain optometrists for, among other things, practicing under a false name, Lee Optical Company; lending their licenses to Lee Optical Company, and thereby aiding and abetting a corporation in the practice of optometry; and splitting fees with Lee Optical. These charges are the same as those in the case at hand. The

only difference is that the corporation in this case was Rich's, Inc., a department store where Respondent had his office.

The District Court in *Berryhill v. Gibson*, 331 F.Supp. 122 (M.D. Ala. 1971), found that a possibility of bias existed in the proceedings as a result of three separate factors. First was the fact that the Board had acted as investigator, prosecutor, and judge, all in the same action. The second and third factors involved the possibility of personal bias. The Court held that a serious question as to the possible personal pecuniary interest of the members had been raised. The Court reasoned that if Lee Optical were forced out of business the individual members of the Board along with other private practitioners would inherit their business. Thirdly, the District Court regarded the Board as suspect because only members of the Alabama Optometric Association were Board members, and the Association excluded from membership non-private practitioners such as the Plaintiff.

The District Court ruled the Board could not constitutionally conduct the hearing and this Court affirmed that decision. Although stating that the District Court was arguably right with respect to either source of bias (*prejudgment* of facts by virtue of the combined Board functions or *personal bias* by reason of financial or membership interests), this Court determined it need reach and affirm only the latter—*possible personal interest*. This Court said:

> . . . The inquiry was not whether the Board members were actually biased, but whether in the natural course of events there was an indication of a *possible temptation* to an average man sitting as a judge to try the case with bias for or against any issue presented to him. 411 U.S. at 571 (emphasis added).

Thus, the standard as set out in *Gibson* is not the actual presence of bias, but the mere "possibility" that such bias may exist.

Petitioners seek to distinguish *Gibson* on the grounds that the case at bar involves a less substantial pecuniary interest. However, the *Wall* opinion, considering the same facts, concluded:

> A related, but distinct argument which the defendants believe demonstrates their lack of pecuniary interest in the case, is that only two optometrists have been proceeded against, and the benefit from any business which could be gained from the demise of the two practices would be *de minimis*. It is also on this ground that the board seeks to distinguish this case from *Gibson*, in which license revocations proceedings were threatened against almost half of Alabama's optometrists. However, this distinction fails in light of the board's admission that it "intends to enforce its regulations against all optometrists licensed but by it . . ." and that the rules under attack here will likely result in the initiation of proceedings against other optometrists unless their manner of practice is altered . . . 379 F.Supp. at 189.

Nor was the *Wall* court persuaded by the contention that the one member of the Board from the Atlanta area had recused himself.[2] The *Wall* Court dismissed this contention in the following manner:

> If the board's argument regarding geographical location were accepted, the board could challenge the license of all the optometrists in the state simply by disqualifying the member from Atlanta in all Atlanta cases, disqualifying the member from Tifton in all Tifton cases, etc. In this way, the board could—and does—argue that it has removed the financial interest in the case geographically, while assuring through this "round-robin" procedure that essentially the same board decided all the cases. In other words, the possibility for "log-rolling" or mutual "back-scratching" is enormous.

Wall, 379 F.Supp. 175, 189.

As to the Petitioners' argument that the appointment of an allegedly independent hearing examiner removed any possibility of bias, the *Wall* court concluded:

> Thus, the law could not be any more clear: the decision of the agency representative is an initial decision only—a final decision of the agency may not be produced without participation by the board. The board is simply incapable of eliminating itself from the process of decision.[3]

Wall, 379 F.Supp. 175, 190.

Thus, Respondent submits that the case of *Gibson v. Berryhill* is squarely on point with the case at bar. The United States Court of Appeals for the Fifth Circut agreed and rendered its decision on this case without opinion. This was also the opinion of the Court in *Wall* which considered the same arguments under the same factual situation. This Court summarily affirmed the result and reasoning of *Wall*, yet Petitioners insist on making the same argument again. A grant of certiorari would be highly inappropriate under these circumstances.

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[2] A factual issue was raised in the District Court as to the actual participation of the Board member from Atlanta. While the District Court did not find it necessary to reach this issue in its decision, in the District court Respondent argued and continues to maintain that the allegedly "recused" member did participate in the hearing and judgment against Respondent. He actually sat with the Board every time the Board considered Respondent's case and apparently seconded the motion to suspend Respondent's license.

[3] In fact, as stipulated by counsel for Petitioners, the President of the Board, Dr. Hardwick, before turning over the proceedings against Respondent to the Hearing Officer stated: "Mr. Ferguson will make the initial decision on findings of fact and conclusions of law, subject, of course, to Board review." Thus, at most the hearing Officer had the "independence" to make the decision desired by the Board. Any other decision would have been reviewed.

IV. The Members of the Board Were Biased as a Result of Their Personal Interest in the Outcome of the Proceedings.

A litigant in our judicial system is guaranteed the fundamental right of a fair trial, which assumes the absence of bias or prejudice in the case. *In Re Murchison*, 349 U.S. 133 (1955); *Berger v. United States*, 255 U.S. 22 (1920); *Knapp v. Kinsey*, 232 F.2d 458 (1956). This absence of bias requires a trier of fact who has no interest in the outcome of the matter before him. *Tumey v. Ohio*, 273 U.S. 510 (1927). Where bias or a predisposition is shown to exist in the trier of fact the litigant has been denied due process of law. *Crawford v. Bounds*, 395 F. 2d 297 (1968); *In Re Oliver*, 333 U.S. 257 (1948). This principle has been extended to the point that not only must actual fairness be assured, but such fairness as will satisfy the "appearance" of justice must also be present. *Amos Treat & Co. v. S.E.C.*, 306 F.2d 260 (D.C. Cir. 1962). Thus, the issue is not limited to actual bias, but extends to the question of whether, in the natural course of events, there is an indication of a possible temptation of bias to an average man sitting as a judge in the case. *Ward v. Village of Monroeville*, 409 U.S. 57 (1972).

This requirement of a fair trial has been extended to administrative agencies as well as courts. *Morgan v. United States*, 304 U.S. 1 (1937); *Ohio Bell Telephone v. Public Utilities Commission*, 301 U.S. 292 (1937); *Powhatan Mining Co. v. Ickes*, 118 F.2d 105 (6th Cir., 1941).

In the case at bar, Respondent submits that the Board of Optometry was biased for several reasons among which are the following:

1. All members of the Board were members of an association which had previously condemned the practices for which Respondent was being tried.
2. All members of the Board had a pecuniary interest in the outcome of the proceedings.

A. Bias is presumed where all of the members of an administrative board are also members of an association which has already condemned the very practices for which the accused is being tried.

The Court in *Wall* at pages 178, 179 found the following facts:

(a) The approximately 300 optometrists in Georgia may be loosely classified in two categories: "dispensing" and "prescribing".

(b) Most dispensing optometrists are members of the Georgia Optometric Association (G.O.A.), a private organization.

(c) Section II(A) of the Code of Ethics of the G.O.A. provides:

> No member shall practice in any business establishment, regardless of whether the same be subdivided, or in or on premises where any materials other than those necessary to render his professional services are dispensed to the public.

(d) Thus none of the 200 or so G.O.A. members is associated with any business establishment. Most non-members of the G.O.A., on the other hand, are prescribing optometrists. They are often associated with commercial enterprises, either those which sell eyeglass lenses and frames primarily or department stores with optical departments.

(e) The Georgia State Board of Examiners in Optometry regulates the practice of optometry in Georgia.

(f) The governor appoints the five members of the Board, who must be optometrists practicing in the state. Although the governor may appoint any licensed optometrist in Georgia to the Board, the G.O.A. has always recommended its members to the governor for appointment and each of the present members

of the board was appointed by the governor after such a recommendation.

(g) Each of the Board members is an active member of the G.O.A. and subscribes to its Code of Ethics and Rules of Practice, including Section II(A), quoted above.

(h) Thus, the Board is and always has been completely controlled by members of the G.O.A.

(i) Thus, the Board has complete control over who may enter the optometry profession in Georgia.

On these facts the *Wall* court found the Board to have a bias against those optometrists who were not members of the G.O.A.

> [I]t is obvious that if plaintiffs were prevented from practicing optometry in Georgia, their patients would have to seek optometric service from others. . . . It cannot be disputed that some would turn to the defendants and their fellow members of the G.O.A. . . . In such circumstances we find it inconceivable that the defendants could be called disinterested in the outcome of plaintiff's license revocation proceedings. *Wall*, 379 F.Supp. 175, 188.

Thus, since the *exact same facts* are present in the case at bar, Respondent submits the same result is required.

B. **One or more Board members having a Pecuniary Interest in the case renders the proceedings voidable.**

It is a well settled rule of law that the presence of an administrative officer or officers who have a pecuniary interest in the outcome of a case renders the entire proceeding void or voidable. *Wall v. The American Optometric Association, Gibson v. Berryhill, supra; Ward v. Village of Monroeville*, 409 U.S. 57 (1972). Thus, since the members of the Board are economic competitors of Respondent and stand to gain the business he will lose if his license is revoked, a pecuniary interest exists which renders the proceedings void.

CONCLUSION

Respondent submits that the case at bar should be controlled by the case of *Gibson v. Berryhill* and *Wall v. Hardwick*. In both these cases this Court has faced situations in which the possible personal interest of administrative board members has been brought into issue. In both cases this Court was of the opinion that this bias rendered the board's proceedings unconstitutional. Therefore, Respondent submits that a grant of certiorari in the case at bar would be totally unnecessary and highly improper.

HUGH W. GIBERT

HAAS, HOLLAND, LEVISON
& GIBERT
2700 First National Bank Tower
Atlanta, Georgia 30303
404-658-1811

Certificate of Service

I, Hugh W. Gibert, a member of the Bar of the Supreme Court of the United States, and counsel of record for Respondent in the above-styled case, hereby certify that I have served opposing counsel with three (3) copies of the foregoing "Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit" by mailing the same to John W. Hinchey, Esquire, 1070 First National Bank Building, Decatur, Georgia 30030.

This 7th day of July, 1976.

Hugh W. Gibert